Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

LI YU,
Administrator of Deceased Wei Wu's Estate
Petitioner,

v.

RICK PERRY,
In his official capacity only
As the Governor of State of Texas;
DARLENE BYRNE,
Individually and in her official capacity
As Texas State Court Judge;
JOHN CORNYN,
Individually and in his official capacity
As Texas Attorney General
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Whether the Petitioner-plaintiff has an equal protection of default judgment guaranteed by the Federal Rules of Civil Procedure 55 and Court-issued Summons due to the respondent-defendant's willful negligence to respond to the complaint by the due date?

2. Whether Texas statutes that allow theft of human organs from deceased, discriminate against non-lawyer citizens and punish them as felons for their legal assistance to others are unconstitutional, violate the First, the Fifth, and the Fourteenth Amendments, have an impact on the public interest, and should be expunged by default judgment?

3. Whether the District Court deprives Petitioner-plaintiff of her Seventh Amendment right for jury trial of this whole case when it dismissed all defendants from this case prior to discovery, except John Cornyn in his official capacity?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner-plaintiff asks that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit initially issued a briefing notice but later entered an order denying the appeal upon appellees-defendants' motion to dismiss the appeal without reviewing appellant's pleadings (Exhibit A: Appendices, pages a-b).

The trial court entered an order denying the plaintiff's motion for default judgment, and dismissing all defendants from this suit, except John Cornyn in his official capacity, on the grounds that it did not have subject-matter jurisdiction over this case (Exhibit B: Appendices, pages c-i).

The appellant filed a post-judgment motion for rehearing and reconsideration with the Fifth Circuit. The same panel in the Fifth Circuit denied the motion (Exhibit C: page j).

JURISDICTION

The Fifth Circuit entered an order dismissing the appeal for lack of jurisdiction August 20, 2002, and denying appellant's motion for rehearing and reconsideration October 1, 2002. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

Pursuant to Rule 13 of the U. S. Supreme Court, this petition is timely filed within 90 days after entry of the judgment of the Court of Appeals for the Fifth Circuit.

CONSTITUTIONAL PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the United States Constitution:

Amendment I

Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XIV

No State shall make or enforce any law which shall abridge the privilege or immunity of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS AT ISSUE

The questions presented implicate the following provisions of Title 28, Federal Rules of Civil Procedure.

Federal Rules of Civil Procedure 5(a)

No service need be made on parties in default for failure to appear.

Federal Rules of Civil Procedure 12(a)(1)(A)

(a). When Presented. (1) Unless a different time is presented in a statute of the United States, a defendant shall serve an answer (A) **within 20 days** after being served with the summons and complaint.

Federal Rules of Civil Procedure 55

(a). **Entry**. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b). **Judgment**. Judgment by default may be entered as follows:

(1). **By the Clerk**. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and cost against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2). **By the Court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein ...

COURT SUMMONS AT ISSUE

The Court-Issued Summons to Texas Governor Rick Perry

"YOU ARE HEREBY SUMMONED and required to serve upon" plaintiff Li Yu "an answer to the complaint which is herewith served upon you, **within (20) twenty days** after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service."

STATEMENT OF THE CASE

This is a civil case, *inter alia*, on the constitutionality of Texas statutes. Petitioner-plaintiff challenges six Texas statutes as unconstitutional that have affected her constitutional rights. These six Texas statutes allow the State of Texas to steal human organs from a deceased, discriminate against non-lawyer litigants, and punish non-lawyer citizens with a third degree felony simply for their legal assistance to others. Texas "unauthorized practice of law" statutes actually

deem non-lawyer citizens as inferior citizens and segregate them from the"lawyer zone" for freedom of legal speech. If non-lawyer citizens step in this "lawyer zone", they become a criminal, and will receive a maximum punishment of 10 years in prison and $10,000 fine.

This case was originated from the wrongful death of Dr. Wei Wu ("Dr. Wu"). Petitioner-plaintiff was not a lawyer but was the court appointed administrator of Dr. Wu's estate and the natural mother of Dr. Wu's minor survivor. In December of 2000, petitioner-plaintiff filed two lawsuits on behalf of her decedent's estate and minor survivor with the State of Texas Court regarding her decedent's wrongful death. Identifying that the petitioner was not a lawyer, Texas State Court immediately nicknamed the petitioner *pro se*, and imposed her to pay additional service fees, $45.00 per defendant, that a lawyer did not have to pay according to the State's custom in executing Texas Local Government Code §86.021. So petitioner paid $749.00 to commence the civil action. Nevertheless, the State of Texas Court subsequently enforced Texas Government Codes §§81.101 and 81.102, labeled petitioner's legal representation of her decedent's estate and child in suit as "unauthorized practice of law", and dismissed her state court lawsuits simply because petitioner was not a lawyer. Petitioner also applied to the State Court to appoint counsel for her decedent and minor survivor in order to continue the prosecution, the State Court denied petitioner's requests as well.

While the State of Texas enforced Texas Health and Safety Code §693 to steal cornea and possible other organs from Dr. Wu for public use, it denied all possible due process of law and equal protection to Dr. Wu and his minor survivor. Besides dismissing the state court lawsuits regarding Dr. Wu's wrongful death, the State of Texas also refused to prosecute a criminal who stole $4000.00 from Dr. Wu's estate, and the Texas Human Rights Commission refused to

take a discrimination charge for Dr. Wu simply because he was not alive any more.

On March 11, 2002, petitioner-plaintiff filed this case with the U. S. District Court for the Western District of Texas under the First, the Fifth, and the Fourteenth Amendments against Texas Governor Rick Perry ("Perry"), Texas State Court Judge Darlene Byrne ("Byrne"), and Texas Attorney General John Cornyn ("Cornyn"). The State of Texas was under its governor's command, so Perry represented the State in this suit. Byrne was sued in her individual and official capacities since she manifestly discriminated against petitioner in Court for not being a lawyer, actively participated in enforcement of Texas unconstitutional statutes to dismiss petitioner's state court lawsuits, etc. Cornyn was sued in his individual and official capacities because Cornyn, as the first leading defending counsel, purposely misrepresented a case law to the state court in order to initiate the process of enforcing Texas "unauthorized practice of law" statutes to deprive petitioner of her First Amendment right.

Plaintiff served the Complaint and Court-issued Summons of this case to these defendants respectively through the U. S. Post Office with certified mail and return receipt requested. The return receipt indicated that the State of Texas received the Complaint and Summons March 22, 2002, which rendered April 11, 2002 to be the due date. However, Perry failed to serve upon plaintiff an answer by the due date. So plaintiff filed a motion with affidavit for default judgement against the State of Texas May 1, 2002, and used the same mailing address that she had previously served the complaint and summons to serve her motion to Perry for courtesy. Perry then appeared in court but this occurred 21 days after the due date. Perry did not file a motion under Fed. R. Civ. P. 12(b)(4) for insufficient service. None of defendants filed an opposition against petitioner's motion for default judgment. As a matter of law, Perry's

failure to appear by the due date rendered that petitioner won the case including $2,315,930.00 monetary damages and abrogation of six alleged Texas statutes.

Even though the law recognizes no social position of the winner and loser in default judgment, the district judge Sam Sparks ("judge Sparks") introduced human beings bias in application of law and failed to provide level ground for the parties to play. Without a court hearing to determine the merit of petitioner-plaintiff's motion for default judgment, judge Sparks exclusively refused to enter default judgment in favor of laws. He not only allowed Perry who was in default to file further pleadings but also granted his invalid motion to dismiss under Fed. R. Civ. P. 12(B)(6). In order to deny petitioner's motion for default judgment and dismiss defendants from this case, judge Sparks even fabricated the legal ground of this lawsuit and alleged that this case was brought under sections 1983, 1985, and 1988 while these sections were never mentioned in the Complaint. Utilizing the trap of case law under section 1983, judge Sparks provided all defendants immunity and dismissed them from this suit. Although Cornyn in his official capacity remained in the case, judge Sparks prejudicially determined that Cornyn did nothing wrong to the petitioner-plaintiff who shall take nothing from Cornyn.

The plaintiff filed a notice of appeal June 12, 2002. The Fifth Circuit initially issued a briefing notice to parties June 28, 2002. Appellant accordingly prepared and submitted her brief. However, appellees-defendants, through a back door of the Fifth Circuit, filed a quick motion[1] to dismiss the appeal July 26, 2002 without timely serving of the motion to the appellant-plaintiff. Because appellees purposely misstated facts and ignored the issue of default judgment, the Fifth

[1] Appellees appeared to file the motion by fax, even though the Fifth Circuit disallows a party to do so except death penalty case.

Circuit dismissed the appeal for lack of jurisdiction without reviewing appellant's pleadings. Appellant then filed a post-judgment "Motion to Reconsider", contesting that her response against appellees' motion was timely filed according to Fed. R. App. P. 27(a)(3)(A). The same panel from the Fifth Circuit denied the "Motion to reconsider" and remanded the case to the District court for further proceedings of the remaining issues. It is from this ruling that the petitioner-plaintiff seeks relief.

REASONS FOR GRANTING THE WRIT

1. DEFAULT JUDGMENT IS A MATTER OF LAW UPON WHICH EQUAL PROTECTION SHOULD BE GUARANTEED

It is imperative to grant the writ of certiorari not only to ensure meaningful and uniform enforcement of constitutional guarantees to all citizens but also to deter the unseemly spectacle of constant denial of **Equal Justice** to non-lawyer litigants.

(1). Federal Rules Have Statutory Effect And Default Judgment Is A Matter of Law:

Justice is the core of our legal system. Title 28, Federal Rules of Civil Procedure, cover the procedural aspects of civil litigation in the United States District Courts. The scope of these Federal Rules is indicated in Rule 1:

> "These rules govern the procedure in the United States district courts in all suits of civil nature... They shall be construed to secure the just, speedy, and inexpensive determination of every action."

These rules have statutory effect. *U.S. for Use of Tanos v. St. Paul Mercury Ins. Co.*, C.A.Fla. 1966, 361 F.2d 838, certiorari denied 87 S.Ct. 510, 385 U.S. 971, 17 L.Ed2d 435. Court and litigants must follow these rules in same manner as they must obey a statute. *Beasley v. U.S.*, D.C.S.C. 1948, 81 F.Supp. 518.

Judgment by default is one of these Federal Rules and a matter of law to "secure the just, speedy, and inexpensive determination of" this action. Fed. R. Civ. P. 12(a)(1)(A) and Court Summons repeatedly emphasize the time frame for a defendant to respond to the complaint to be 20 days from the date the defendant receives the Complaint and Court Summons. No matter if a defaulted party is an individual, a company or a State government, once a defendant fails to appear by the due date, the defendant is in default and loses all legal rights to proceed with the case according to Fed. R. Civ. P. 5. Judgment by default will be accordingly entered as plaintiff wins the case, which is warranted by Fed. R. Civ. P. 55. Once a defendant fails to file a responsive answer, he is in default, and entry of default may be made by either the clerk or judge. *Kackson v. Beech*, 1980, 636 F.2d 831, 205 U.S.App.D.C. 84. Default judgment can be entered by clerk of Court when a party is in default for failure to appear. *Arango v. Guzman Travel Advisors*, C.A.11 (Fla.) 1985, 761 F.2d 1527, certiorari denied 106 S.Ct. 408, 474 U.S. 995, 88 L.Ed.2d 359.

(2). The Defendant's Default Was Willful, Upon Which Petitioner Was Entitled Default Judgment:

The certified mail with return receipt for the service of Complaint and Summons is an acceptable approach for the service process by the Fed. R. Civ. P. 4. Accordingly, once the United States Post Officer delivered the Complaint and Summons to Perry's published official mailing address and obtained the proof for such service, it constituted a sufficient service. If Perry failed to open the envelope, review and

answer the complaint and Summons by the due date, or threw them away, this willful negligence was beyond the service of Summons process.

Perry was the Governor of Texas and competent enough to represent the State in this suit. Perry's counsel, Mr. Daniel Perkins[2], was aware of this case against Perry/the State of Texas since he also actively represented his supervisory defendant Cornyn in this suit from day one. The fact that Perry and his counsel did not file a motion under Fed. R. Civ. P. 12(b)(4) for insufficiency of process service suggested that Perry indeed received the Complaint and Summons March 22, 2002. Accordingly, his failure to serve plaintiff an answer by April 11, 2002 rendered that the State automatically lost the case and petitioner was entitled default judgment.

(3). The State Lost All Legal Rights to Proceed with the Case after Being Defaulted:

Even though the State may have immunity to shield a frivolous suit under the Eleventh Amendment, no law allows the State to be immune from default judgment. Since Perry failed to represent the State by appearing by the due date, the State lost all legal rights in this suit including the right to assert immunity, pursuant to Fed. R. Civ. P. 5. Defendant, being technically in default for failure to file answer, could not press motion to dissolve preliminary injunction. *I.C.C. v. Smith, D.C.Pa.* 1949, 82 F.Supp. 39. Accordingly, Perry/the State of Texas should have been barred from filing further pleadings or asserting immunity after being defaulted. In particular, this suit is not near the verge of frivolity because it is relevant to the human life, social morality, and people's Constitutional rights for freedom of speech, private property, equal protection and due process of law. By definition there can be no inconsistency between the default judgment and

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[2] Mr. Perkins appeared resigning from the position November 15, 2002.

pleadings inasmuch as default necessarily has effect of admitting all well-pleaded facts in a complaint relating to liability. *In re Uranium Antitrust Litigation*, D.C.Ill.1979, 473 F.Supp. 382, remanded on other grounds 617 F.2d 1248. General rule is that, upon default, factual allegations of the complaint, except those relating to amount of damages, will be taken as true. *Geddes v. United Financial Group*, C.A.Or. 1977, 559 F.2d 557.

Moreover, the State of Texas has factually violated the U. S. Constitution and caused damages to petitioner and her decedent and thus lost its immunity. The Fourteenth Amendment allows federal power to intrude upon the province of the Eleventh Amendment and, therefore, to abrogate states' Eleventh Amendment immunity from suit. *Seminole Tribe of Florida v. Florida*, U.S.Fla. 1996, 116 S.Ct. 1114, 517 U.S. 44, 134 L.Ed.2d 252.

(4). Judgment by Default Is Final, and the District Court Had Subject Matter Jurisdiction to Enter Default Judgment in Favor of Laws:

The District Court did not dismiss defendant Cornyn in his official capacity, which suggested that the District Court had subject-matter jurisdiction over this civil case against the State of Texas, pursuant to 28 U.S.C. §1331, and 28 U.S.C. §§2201 & §2202, otherwise, it would have dismissed the whole case. It is in injustice that the district court denied the subject-matter jurisdiction when a non-lawyer plaintiff was entitled default judgment but admitted the same jurisdiction after skipping the issue of default judgment and denying justice.

Default judgment is unassailable on the merits so far as it is supported by well-pleaded allegations that are assumed to be true. *Nishimatsu Const. Co., Ltd. V. Houston Nat. Bank, C.A.Tex.* 1975, 515 F.2d 1200.

2. THE ALLEGED TEXAS STATUTES ARE UNCONSTITUTIONAL, HAVE INJURED PETITIONER AND HER DECEDENT AND CONTINUOUSLY AFFECTED THE PUBLIC INTEREST, AND SHOULD BE ACCORDINGLY EXPUNGED BY DEFAULT JUDGMENT

This Court should grant the writ of certiorari in order to judge the constitutionality of the alleged Texas Statutes and ensure these Texas Statutes will not continuously affect the public interest should they be determined to be unconstitutional.

(1). Texas Health and Safety Code §693:

The §693.003(c) allows Texas medical examiners to remove human organs or tissues from a deceased if the deceased's survivors can not be contacted within four hours after the death is pronounced, which is outlined as follows:

> "(c) If a person listed in Section 693.004 cannot be identified and contacted within four hours after death is pronounced and the medical examiner determines that no reasonable likelihood exists that a person can be identified and contacted during the four-hour period, the medical examiner may permit the removal of a nonvisceral organ or tissue."

The persons listed in §693.004 include the decedent's spouse, adult children, parents, brothers or sisters. Minor child and legal representative of the deceased and minor are not even on the list for contact. Accordingly, the State of Texas harvested the cornea and possible other organs from Dr. Wu for public use, and kept this secrete until petitioner discovered her decedent's missing cornea and questioned such action.

"Equal Protection" of private property and human right does not allow the State of Texas to steal Dr. Wu's body parts for public use without compensation. Children are entitled equal protection of their parents' body parts from theft by the State. The cruel action done by the State of Texas, committing theft and damaging Dr. Wu's private property, were inhuman and abridged Dr. Wu and his survivor of their Fifth and Fourteenth amendment rights. Even though a deceased may not have a relative or legal representative, the State should be prohibited from removing any tissue from the deceased because stealing from deceased and taking advantage of deceased are publicly recognized as disgusting and criminal and controversial with human rights, civilization, morality, and equal protection.

(2). Texas Government Codes §81.101 and §81.102:

The "practice of law" in Texas is defined in code §81.101(a) as follows:

> "In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument..."

Code §81.102 further prohibits non-lawyer citizens from "practice of law" as defined in the Code §81.101 from preparing a personal will out of court to speaking in court before a judge.

Byrne, enforcing these statutes, accordingly labeled petitioner's legal representation of her decedent and child in suit as "unauthorized practice of law", and denied the due

process of law regarding Dr. Wu's wrongful death simply because petitioner was not a lawyer.

Law controls the safety and equity of society. Legal matter is an important activity in people's daily life. Non-lawyer citizens should not have a fear to receive punishment for exercising their First amendment right for freedom of legal speech. Freedom of speech, at the least, is the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. See *Thornhill v. Alabama*, 310 U.S. 88 (1940) (USSC+).

Petitioner-plaintiff's legal representation of her decedent and minor survivor in suit is to "peacefully petition the Government for a redress of grievances" regarding her decedent's wrongful death. This is especially true when lawyers only recognize money, refuse to provide free legal advice and service to the general public, and abandon the deceased, minor and incompetent persons who can not represent themselves in Court. It was unconstitutional that the State of Texas punished petitioner-plaintiff for her freedom of speech by dismissing plaintiff's two state court lawsuits after imposing her to pay more legal fees than lawyers simply because petitioner was not a lawyer.

Texas Government Codes §81.101 and §81.102 are in controversy with the First Amendment to the Constitution of United States and should be expunged by default judgment.

(3). Texas Penal Codes §38.122 and §38.123:

Texas Penal Code §38.122 punishes non-lawyer citizens with a third degree felony simply for holding oneself out as a lawyer with intent to obtain an economic benefit for himself or herself. The maximum punishment for a third degree felony in Texas was 10 years in prison and $10,000 fine. Texas Penal Code §38.123 further defines the "Lawyer Zone"

stating that a non-lawyer citizen should not enter, or be punished as a criminal.

"§ 38.123. Unauthorized Practice of Law
(a) A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person:
(1) contracts with any person to represent that person with regard to personal causes of action for property damages or personal injury;
(2) advises any person as to the person's rights and the advisability of making claims for personal injuries or property damages;
(3) advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;
(4) enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action; or
(5) enters into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.

(b) This section does not apply to a person currently licensed to practice law in this state, another state, or a foreign country and in good standing with the State Bar of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed.

(c) Except as provided by Subsection (d) of this section, an offense under Subsection (a) of this section is a Class A misdemeanor.

> (d) An offense under Subsection (a) of this section is a felony of the third degree if it is shown on the trial of the offense that the defendant has previously been convicted under Subsection (a) of this section."

While holding oneself out as a lawyer in order to charge attorney fees is fraud, the legal activities describing in Texas Penal Code §38.123 do not involve any violence, fraud, theft, drugs, etc. to injure another, but are a win-win game. Thus the aforesaid legal activities do not belong to the category of criminal. Any meritorious case going for trial will have 50% opportunity to lose. A lawyer does not guarantee to win a case but still wants to charge $200 per hour for the service. The middle class people do not always have adequate money to satisfy lawyer's desire for money because they only earn $10-$40 per hour, which, however, should not prevent them from achieving equal justice.

Law is written and published in the book. A *pro se* litigant can perform legal work without a lawyer, which suggests that legal work is not high tech, and an average person can understand the law and legal system with reasonable instruction. While non-lawyer citizens are required to comply with the law, they should have rights to learn and understand the law first. People have freedom of speech to communicate for the knowledge of law, and teach, learn, and help each other in order to handle legal matters and comply with law correctly. Teaching and learning the knowledge of law and assisting another in legal matters is not criminal but civilization. This civilization promotes diverse competition for justice and assists every lawyer-abandoned person access to equal justice.

As a matter of fact, lawyers set up the legal system and seal off the legal instruction of the system to non-lawyers, which causes the social problem of the above so-called "unauthorized practice of law". Punishing non-lawyer

citizens as criminals simply for their legal assistance to another is to punish justice and does not resolve the problem of injustice. Petitioner-plaintiff in this case is a licensed engineer and is more than happy to hand over the lawsuits regarding her decedent's wrongful death to a lawyer if lawyers in this country are willing to compete for justice. Unfortunately, nowadays, lawyers are more interested in money rather than justice. In a civilized society, the public should receive free legal advice and service because the public financially supports the legal system and the legal instruction of the system is public information. The middle class people including scientists, engineers, and professors have made significant contributions to modernize and defend this country, pay taxes to support our legal system, and deserve fair treatment. Lawyers have received free technical instruction from engineers on how to use engineer-designed products including TVs, computers, cars, etc. If engineers and other professionals had sealed off the technical instruction of engineer-designed products to lawyers, lawyers would not have known how to use them and would have to either be self taught or assist each other in order to figure out the operation of the modern engineer-designed products. Since engineers have provided free technical instruction with their products to the general public, lawyers should have been faithful to provide free legal advice to all citizens in return. In particular, the function of a lawyer is to compete for justice instead of money. Free legal service to the general public will minimize the social problem of injustice and lawyers will accordingly regain respect by people.

Boiling down these Texas "unauthorized practice of law" statutes, they do not attempt to guarantee the service of justice, nor protect the public interest but incite lawyers to monopolize the court in order to gain huge profits from litigation and promote lawyers to work for money instead of justice. They isolate non-lawyer citizens from receiving legal assistance that they can afford and impede the service of

justice. These statutes have an impact on society because they, in general, discriminate against non-lawyer citizens, and deem them as inferior citizens with lesser constitutional rights, privilege and immunity for freedom of legal speech than lawyers do. Innocent non-lawyers are unconstitutionally trapped into the criminal category simply for exercising their first amendment rights for freedom of legal speech.

Since the general public has not received free legal advice and service from lawyers yet, people at least should have freedom of legal speech to assist each other without fear of receiving punishment. In order to protect the public interest, Texas "unauthorized practice of law" statutes should be expunged by default judgment.

(4). Texas Local Government Code 86.021:

Texas Local Government Code 86.021(d) is a service statute and states as follows:

> (d) Regardless of the Texas Rules of Civil Procedure, all civil process may be served by a constable in the constable's county ...

In executing this service statute, it becomes that non-lawyer litigants must pay additional service fees to the State of Texas to serve the complaint, citation, subpoena, writ, etc. and lawyers do not have to comply with this statute.

Law is supposed to benefit the society and promote equal justice in the public interest. Every person, lawyer or non-lawyer is equal before the law. As this statute has become a tool for the State of Texas to judicially discriminate against non-lawyer citizens, this statute should be expunged as well by default judgment.

3. THE DISTRICT COURT DEPRIVES PETITIONER OF HER SEVENTH AMENDMENT RIGHT FOR JURY TRIAL OF THIS WHOLE CASE BY DISMISSING DEFENDANTS FROM THIS SUIT

Aside from the issue of default judgment, the petitioner-plaintiff has a constitutional right for jury trial of this whole case. Dismissing defendants from this suit actually deprived petitioner of her Seventh amendment right for jury trial. The function of district judge is to assure the due process of law and administer the service of justice. Whether defendants are guilty or not for violation of plaintiff's constitutional rights is a jury matter that will be determined at trial. The district judge should not determine such because of the Seventh amendment. In particular, the immunity, if any, should not have been built on fabricated legal ground. In this case, the defendants lost the Eleventh amendment immunity when they clearly violated petitioner's constitutional rights. The petitioner's First, Fifth, Seventh, and Fourteenth amendment rights are preponderance over the defendants' immunity.

The Fifth Circuit remanded the case to the District Court for further proceedings over petitioner's remaining issue. The center of this case was on the constitutionality of Texas statutes. The District Court claimed that it lacked subject-matter jurisdiction over this case against the State of Texas so it denied entering default judgment. Accordingly, what remaining issue and what subject-matter jurisdiction does the District Court have against Cornyn in his official capacity?

If the District Court has the subject-matter jurisdiction over this case, the default judgment should be entered by now. The remaining issue after default judgment will be the prosecution of defendants Byrne and Cornyn in their individual capacities. If the District Court does not have the subject-matter jurisdiction over this case, there was no remaining issue hereby. Whether the district court has the

subject-matter jurisdiction over petitioner's claims is a legal matter and should be determined by law rather than by the district judge's random discretion.

The federal court does not favor to dismiss the complaint under Rule 12. Court must accept all factual allegations as true, must draw all reasonable inferences in favor of plaintiff, and must liberally construe plaintiff's pleadings. *TV Communications network, Inc. v. ESPN, Inc.*, D.Colo.1991, 767 F.Supp. 1062, affirmed 964 F.2d 1022, certiorari denied 113 S.Ct. 601, 506 U.S. 999, 121 L.Ed.2d 537. Dismissal of complaint was "final decision," for purpose of appeal, even though it did not explicitly dismiss the entire action. Acevedo-Villalobos v. Hernandez, C.A.1 (Puerto Rico) 1994, 22 F.3d 384, certiorari denied 115 S. Ct. 574, 513 U.S. 1015, 130 L.Ed.2d 490, rehearing denied 115 S. Ct. 925, 513 U.S. 1122, 130 L.Ed.2d 804.

CONCLUSION

For the reasons set forth above, Petitioner LI YU respectfully prays that this Court grant a writ of *certiorari*, vacate the decision below, determine the constitutionality of alleged Texas statutes, and remand this case for reconsideration of default judgment in accordance with the applicable laws.

Respectfully Submitted,

Li Yu

Li Yu
1514 SW. Wayne Avenue
Topeka, Kansas 66604
(785) 233 – 0237

Dated : November 15, 2002

APPENDICES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50615 ("FILED" Seal)

1-02-CV-157-SS

LI YU, Administrator of Deceased Wei Wu's Estate,
Plaintiff – Apeellant,

v.

RICK PERRY, in his official capacity only As th [sic] Governor of State of Texas; DARLENE BYRNE, Individually and in her official capacity as Judge of Texas Court; JOHN CORNYN, individually and in his official capacity as Texas Attorney General;
Defendants – Appellees.

Appeal from the United States District Court for the
Western District of Texas, Austin

Before DAVIS, WIENER, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:
IT IS ORDERED that the motion of appellees to dismiss the appeal for lack of jurisdiction is GRANTED.

IT IF FURTHER ORDERED that the motion of appellees to remand the case to the district court for further proceedings on the appellant's remaining claims is GRANTED.

A true copy Test
Clerk, U.S. Court of Appeals, Fifth Circuit

Signature of judge Initials

By Signature
Deputy
New Orleans, Louisiana
Aug 20, 2002

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

August 21, 2002

Mr. [Sic] Li Yu
1514 SW. Wayne Avenue
Topeka, KA [Sic] 66604

No. 02-50615 Yu v. Perry
USDC No. A-02-CV-157-SS

We received your response to appellee's motion to dismiss the appeal. We are taking no action on this response as it was received out of time.

Sincerely,
HARLES R. FULBRUGE III, Clerk

By: Signature
Lisa Conrad, Deputy Clerk
504-310-7697

cc: Mr. Daniel Clark Perkins
Mr. James Joseph Scheske

BR-9

c

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LI YU, Administrator of the Estate of Wei Wu, Deceased

Plaintiff,

"FILED"
Seal

-Vs-

Case No. A02-CA-157-SS

RICK PERRY, in His Official Capacity Only as the Governor of State of Texas; DARLENE BYRNE, Individually and in Her Official Capacity as a Judge of Texas Court; and JOHN CORNYN, individually and in His Official Capacity as Texas Attorney General,

Defendants.

ORDER

BE IT REMEMBERED on the 20th day of May 2002 the Court reviewed the file in the above-styled cause, specifically defendant Byrne's Motion to Dismiss [#2], plaintiff's response [#7], and Byrne's reply [#11]; defendant Cornyn's Partial Motion for Summary Judgment [#6] and plaintiff's response [#12]; defendant Perry's Motion to Dismiss [#10]; and plaintiff's Motion for Default Judgment against the State of Texas [#8]. Having considered the motions and responses, the case file as a whole and the applicable law, the Court enters the following opinion and orders.

Background

The plaintiff, LiYu, a Kansas resident, filed this civil rights lawsuit pursuant to 42 U.S.C. §§1983, 1985, and 1988. She alleges the defendants violated her constitutional rights in connection with two lawsuits she brought in Travis County district court concerning the death of Wei Wu, of whose estate she was appointed administrator. She contends the defendants conspired to violate

and did violate her rights to bring *pro se* lawsuits, protected by the First, Fourth and Fifteenth Amendments to the United States Constitution. Yu seeks declaratory relief that certain state statutes are unconstitutional; injunctive relief preventing the enforcement of such statutes and reinstating her state court cases; and monetary damages.

Defendant Byrne is a Travis County District Judge who presided over certain proceedings in Yu's lawsuit against Wu's medical staff. Yu sues Byrne in her individual and official capacities. Defendant Perry is Governor of the State of Texas, and Yu sues him only in his official capacities as governor. Defendant Cornyn is Attorney General for the State of Texas. Yu sues Cornyn in his individual and official capacities.

In December 2000, Yu filed a medical malpractice and defamation lawsuit on behalf of Wu's estate and his minor survivor in the 261st District Court of Travis County, Case No. GN003531, and another suit on behalf of Wu's estate against the State of Texas Department of Transportation ("TxDOT") and two TXDOT employees in the 345th District Court of Travis County, Case No. GN003532. *See* Byrne's Motion, Ex. A. The state attorney general's office, representing TXDOT, moved to abate Case No. GN003532 because an estate is an entity that cannot proceed *pro se*. *See* Plaintiff's Response to Cornyn's Motion [#12], Ex. A. Judge Byrne, presiding over the case in accordance with the rotating docket, granted the motion. On October 4, 2001, a different district judge dismissed the case.[1] Case No. GN003531 was dismissed on December 12, 2001.

Based on the outcome in the above two lawsuits, Yu contends the state statutes prohibiting the unauthorized practice of law by non-lawyers, Texas Government Code §§81.101 and 81.102, are unconstitutional because they prohibit *pro se* plaintiffs from exercising their right to represent themselves. Complaint, at ¶79-

---

[1] As the plaintiff notes, "On October 31, 2001, plaintiff filed an almost identical complaint against the TxDOT defendants with Federal Court after the state court dismissed the case GN003532." Complaint, at ¶72. That case, Case No. A-01-741-SS, is currently pending before this Court.

89. She also contends Texas Penal Code §§38.122 and 38.123, which make it a third-degree felony for a non-lawyer to gain benefit by acting as a lawyer, are unconstitutional. Id at ¶¶ 90-99. Additionally, she argues the process-serving statute, Texas Government Code §86.021 (c) & (d), discriminates against *pro se* litigants. *Id* at ¶¶ 101-107. She also alleges Texas Health and Safety Code §693 allows a medical examiner to take body parts from a deceased without consent, in violation of the Fifth Amendment. *Id* at ¶¶ 109-113. She contends Rule 92 of the Texas Rules of Civil Procedure allows defendants to assert a general denial to plaintiff's allegations, which discriminates against plaintiffs. *Id* at ¶¶ 114-118. Finally, she alleges the State of Texas discriminated against her by extorting money from her, refusing to prosecute a thief who stole from Wu's estate, refusing to take a discrimination case on behalf of a deceased person, and failing to appoint counsel to represent the deceased. *Id* at ¶¶ 120-125.

Judge Byrne moves to dismiss Yu's claims against her on the basis of judicial immunity. Perry moves to dismiss Yu's claims against him and the State of Texas on the basis of Eleventh Amendment immunity. Cornyn moves for partial summary judgment on Yu's claims against him in his individual capacity.

Analysis

I. Byrne's Motion to Dismiss

Judge Byrne moves to dismiss Yu's claims against her in her individual and official capacities on the basis that she is immune from suit. Under the doctrine of judicial immunity, judges are absolutely immune from suit over judicial acts performed in judicial proceedings, even for acts allegedly done with malicious or evil motive. *Antoine v. Byers & Anderson*, 508 U.S. 429 (1993); Mays v. Sudderth, 97 F.3d 107, 110-11 (5th Cir. 1996). All of Yu's allegations concerning Judge Byrne relate to actions she purportedly took while adjudicating Yu's state court lawsuits, in the course of her official capacity as Travis County District Judge. See Complaint, at ¶¶ 11-14.

The only exception to absolute judicial immunity arises when a judge acts in the clear absence of jurisdiction to do so. *City of*

Houston v. Swindall, 960 S.W.2d 413, 417 (Tex. App. – Houston [1st Dist.] 1998, no writ). Yu contents Judge Byrne lacked jurisdiction over Yu's state court lawsuits "other than on a rotating basis," due to the state district courts' rotating docket system. Yu's response [#7], at 2. However, the rotating docket system does not deprive a judge of jurisdiction over a case assigned to her, and Judge Byrne clearly had jurisdiction over the cases when she took the alleged actions. Accordingly, Judge Byrne should be dismissed as a party defendant in this case on the basis of judicial immunity.

II. Perry's Motion to Dismiss

Defendant Perry moves to dismiss Yu's claims against him on the basis of Eleventh Amendment immunity. Yu sues him only in his official capacity as the Governor of Texas, acting on behalf of the State of Texas. Yu moved for default judgment against Perry and the State of Texas on May 1, 2002, alleging Perry did not answer within twenty days of being served a summons and complaint. She presents a return receipt from certified mail indicating the complaint was received by "Doug Bennight, Mail & Messenger Service" on March 22, 2002. However, Perry contends he was never served with the complaint and received notice of the complaint only when Yu filed for default judgment. Perry filed an answer May 2, 2002. Because, as discussed below, the Court does not have subject-matter jurisdiction over Yu's claims against Perry and the State of Texas, the Court cannot enter a default judgment against Perry and the State of Texas. *See, e.g., MCI Telecomm. Corp. v. Alhadhood*, 82 F.3d 658, 661-62 (5th Cir. 1996)(vacating default judgment and dismissing for failure of subject matter jurisdiction, finding defendants did not waive immunity by failing to answer); *Patray v. Northwest Publ'g, Inc.*, 931 F.Supp. 865, 869 (S.D. Ga. 1996).

Yu sues Perry in his official capacity, acting on behalf of the State of Texas. *See* Complaint, at ¶33. Under the Eleventh Amendment, federal courts lack subject matter jurisdiction over suits by a citizen of a state against the state, absent the state's consent. *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890). Because the State of Texas has not consented to this lawsuit, it is immune from suit. Additionally, a plaintiff may sue a state official for damages only if she sues the official in his individual capacity,

because a suit against a state official in his official capacity is essentially a suit against the state itself. *Hafer v. Melo*, 502 U.S. 21, 27, 112 S.Ct. 358 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304 (1989). Because Yu sues Perry only in his official capacity, the Court has no subject matter jurisdiction over her claims against him for damages.

A plaintiff may sue a state official in his official capacity for prospective injunctive relief. *Will*, 491 U.S. at 71 n. 10 (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985); *Ex Parte Young*, 209 U.S. 123, 159-60 (1908)). In this case, however, Yu fails to state a claim against Perry upon which relief can be granted, because Perry has no enforcement authority over the statutes Yu claims are unconstitutional. To override Eleventh Amendment immunity under the *Ex parte Young* exception in a suit challenging the constitutionality of a state statute, the state officer defendant must "have 'some connection with the enforcement of the act' in question or be 'specially charged with the duty to enforce the statute' and be threatening to exercise that duty." *Okpalobi v. Foster*, 244, F.3d 405,414 (5th Cir. 2001) (*en banc*) (quoting *Ex Parte Young*, 209 U.S. at 157, 158, 28 S.Ct. 441). Yu has not alleged Perry has any connection to the enforcement of the state statutes she challenges, or that he is threatening to exercise his enforcement duty. Therefore, Perry cannot give effect to any injunctive relief the Court may order, and Yu fails to state a claim against him upon which relief can be granted.

III. Cornyn's Motion for Partial Summary Judgment

Yu sues Cornyn, the Attorney General for the State of Texas, in his individual and official capacities. Cornyn moves for summary judgment on Yu's claims against him in his individual capacity on the basis of qualified immunity. Summary judgment may be granted if the moving party demonstrates there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). For purposes of summary judgment, the Court considers the evidence of the plaintiff, as the nonmoving party, as true and draws all justifiable inferences in his favor. *Anderson v. Liberty Lobby, Inc.* 106 S. Ct. 2505, 2513 (1986). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient

factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990).

The qualified immunity doctrine shields state officials from suit in their individual capacity "insofar as [their] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Anderson v. Creighton*, 483 U.S. 635 (1987). Qualified immunity "is designed to shield from civil liability all but the plainly incompetent, or those who violate the law." *Brady v. Fort Bend Cty.*, 58 F.3d 173, 174 (5th Cir. 1995). In the Fifth Circuit, "the test for qualified immunity is quite familiar: (1) whether the plaintiff has alleged a violation of a clearly established constitutional right and (2) if so, whether the defendant's conduct was objectively unreasonable in the light of the clearly established law at the time of the incident." *Domino v. Texas Dep't of Crim. Justice*, 239 F.3d 752, 755 (5th Cir. 2001). If the answer to either question is "no", the defendant is immune from suit.

Cornyn contents he is entitled to qualified immunity because Yu does not allege any action taken by Cornyn personally, but her only claims are against him in his role as the head of the Attorney General's Office. Under 42 U.S.C. §1983, however, a supervisor cannot be held liable for alleged actions of his subordinates under the theory of *respondeat superior*. *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 286 (5th Cir. 2002); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 (5th Cir. 1996) (en banc). Yu challenges the constitutionality of actions of attorneys for the Attorney General's Office in her state court lawsuit against TXDOT and their actions in enforcing unconstitutional state statutes. The evidence unequivocally indicates Cornyn was not personally involved in the TXDOT suit. *See* Cornyn's Motion, Ex. A ("Hill Affidavit"). Yu contents Cornyn was personally involved in the suit because his name appeared on the pleadings. However, his name appeared on the pleadings only in his official capacity as the Attorney General and head of the Attorney General's Office. Yu's response to the summary judgment motion merely confirms

her attempt to hold Cornyn responsible for the actions of his subordinates.[2] Accordingly, Cornyn's motion for partial summary judgment is granted as to Yu's claims against him in his individual capacity.

In accordance with the foregoing:

IT IS ORDERED that Plaintiff's Motion for Default Judgment against the State of Texas [#8] is DENIED;

IT IS FURTHER ORDERED that Defendant Byrne's Motion to Dismiss [#2] is GRANTED;

IT IS FURTHER ORDERED that Defendant Cornyn's Partial Motion for Summary Judgment [#6] is GRANTED, and Plaintiff shall TAKE NOTHING from Defendant Cornyn in her suit against him in his individual capacity;

IT IS FURTHER ORDERED that Defendant Perry's Motion to Dismiss [#10] is GRANTED;

IT IS FINALLY ORDERED that the only remaining claims in this lawsuit are Plaintiff's claims against Defendant Cornyn in his official capacity.

SIGNED this the 20th day of May 2002.

Signature
SAM SPARKS
UNITED STATES DISTRICT JUDGE

---

[2] Additionally, Yu's discussion of Clinton v. Jones, 520 U.S. 681 (1997), in her response to Cornyn's motion indicates her confusion about the difference between official and unofficial acts and suit in official and individual capacity. Bring suit against a public official for his unofficial acts is not the same as suing an official in his individual capacity. *Hafer v. Melo*, 502 U.S. 21, 27, 112 S.Ct. 358, 362-63 (1991).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50615 ("FILED" Seal)

1-02-CV-157-SS

LI YU, Administrator of Deceased Wei Wu's Estate,
Plaintiff – Apeellant,

v.

RICK PERRY, in his official capacity only As th [sic] Governor of State of Texas; DARLENE BYRNE, Individually and in her official capacity as Judge of Texas Court; JOHN CORNYN, individually and in his official capacity as Texas Attorney General;
Defendants – Appellees.

Appeal from the United States District Court for the
Western District of Texas, Austin

Before DAVIS, WIENER, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

This panel previously granted appellees' motion to dismiss appeal for lack of jurisdiction and motion to remand case. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

Signature of
judge initials

A true copy Test
Clerk, U.S. Court of Appeals,
Fifth Circuit
By Signature
Deputy
New Orleans, Louisiana
OCT 1, 2002

Supreme Court, U.S.
FILED
DEC 17 2002
OFFICE OF THE CLERK

No. 02-~~111~~ 777

In The

Supreme Court of the United States

LI YU, ADMINISTRATOR OF DECEASED WEI WU'S ESTATE,

Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY ONLY AS THE GOVERNOR OF THE STATE OF TEXAS; DARLENE BYRNE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS TEXAS STATE COURT JUDGE; JOHN CORNYN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT JUDGE DARLENE BYRNE'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit had jurisdiction when Petitioner attempted to appeal a non-final, interlocutory order that the district court did not certify as final.

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RESPONDENT JUDGE DARLENE BYRNE'S BRIEF IN OPPOSITION TO CERTIORARI

INTRODUCTION

The Court of Appeals for the Fifth Circuit correctly dismissed Petitioner's attempted appeal of the district court's May 20, 2002 order, which, *inter alia*, granted Respondent Judge Byrne's motion to dismiss. The Fifth Circuit lacked jurisdiction under 28 U.S.C. § 1291 because the district court's order did not constitute a final decision, nor did the order amount to an appealable interlocutory order under 28 U.S.C. § 1292. Finally, the district court did not certify its May 20, 2002 order as final and appealable under Fed. R. Civ. P. 54(b). Accordingly, the circuit court lacked jurisdiction and properly dismissed Petitioner's appeal.

STATEMENT OF THE CASE

Judge Byrne has served as a District Judge in Travis County, Texas since her election in 2000. Judge Byrne conducted official court proceedings in connection with an alleged wrongful death lawsuit filed by Petitioner in Texas state court. In the district court below, Petitioner challenged Judge Byrne's courtroom actions and decisions and also filed constitutional challenges to various Texas statutes.

On May 20, 2002, the district court granted, *inter alia*, Judge Byrne's motion to dismiss. Pet'r App. at c. But the district court's order plainly stated that Petitioner's claims concerning the constitutionality of Texas' Unauthorized Practice of Law statute, pending against Texas Attorney

General John Cornyn[1] in his official capacity, remain to be adjudicated. Pet'r App. at c, p. 8. The district court neither rendered a final decision nor entered a final judgment.

On August 20, 2002, the Court of Appeals for the Fifth Circuit dismissed Petitioner's attempted appeal of the district court's May 20, 2002 order. Pet'r App. at a. Petitioner now seeks certiorari from the Fifth Circuit's order of dismissal and remand to the district court.

REASONS FOR DENYING THE PETITION

I. There Is No Final Judgment In The District Court.

A district court judgment is final if it concludes the case on the merits. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). The district court's May 20, 2002 order states that the claims against Texas Attorney General John Cornyn regarding the constitutionality of the Texas Unauthorized Practice of Law statute remain to be adjudicated. Pet'r App. at c, p. 8. The district court did not issue a final decision, nor has it entered a final judgment. *See* 28 U.S.C. § 1291. Because there was no final judgment, the Fifth Circuit correctly dismissed Petitioner's appeal unless Petitioner can demonstrate some other jurisdictional basis.

[1] General Cornyn has been elected to the United States Senate and recently assumed those duties upon the resignation of Senator Phil Gramm. Presumably his successor as Attorney General will be joined *sub nomine*.

II. The District Court's Order Is Not An Appealable Interlocutory Order.

Circuit court jurisdiction in appeals stemming from interlocutory orders is governed by 28 U.S.C. § 1292. Specifically, circuit courts have limited jurisdiction over:

> (1) Interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

28 U.S.C. § 1292(a).

Petitioner's case implicates none of these provisions, nor does her petition even attempt to argue that a 28 U.S.C. § 1292 exception applies to the district court's May 20, 2002 order. Thus, the Fifth Circuit's dismissal was correct unless some other jurisdictional provision applies.[2]

---

[2] Similarly, this Court's "collateral order" doctrine is inapplicable to the order from which appeal was taken. *See, e.g., Cunningham v. Hamilton County*, 527 U.S. 198, 201-03 (1999).

III. The District Court Did Not Certify Its Interlocutory Order As Appealable.

The Fifth Circuit also lacked jurisdiction because the district court never certified its order as final and appealable under Fed. R. Civ. P. 54(b). The Fifth Circuit, sitting *en banc*, set forth its standard for reviewing Rule 54(b) orders:

> If the language in the order appealed from, either independently or together with related portions of the record referred to in the order reflects the district court's unmistakable intent to enter a partial final judgment under Rule 54(b), nothing else is required to make the order appealable. We do not require the judge to mechanically recite the words "no just reason for delay."

Kelly v. Lee's Old Fashioned Hamburgers, Inc., 908 F.2d 1218, 1220 (5th Cir. 1990) (*en banc*).

Here, the district court's May 20, 2002 order does not constitute an "unmistakable intent to enter a partial final judgment under Rule 54(b)." Instead, the district court dismissed some parties and claims but not all of them. Thus, the Fifth Circuit lacked jurisdiction over Petitioner's appeal and properly dismissed it.

IV. Petitioner Fails To Argue Jurisdiction.

Certiorari should also be denied because Petitioner wholly fails to establish why the Fifth Circuit possessed jurisdiction to determine an appeal of the district court's May 20, 2002 order. Instead, Petitioner merely attempts to argue the merits of her case, without demonstrating

circuit court jurisdiction. For this reason alone, certiorari should be denied.

CONCLUSION

Petitioner fails to accept or acknowledge the cardinal rule of appellate procedure: not every order of a district court is immediately appealable. The May 20, 2002 order from which her appeal stems is not a final order, is not an interlocutory order from which appeal is permitted, nor is it an order to which any other jurisdictional exception applies.

For the foregoing reasons, Judge Byrne respectfully requests that this Court deny the Petition.

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD L.L.P.
JAMES J. SCHESKE
Counsel of Record

Attorney for Respondent Judge Darlene Byrne